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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

WAWONA PACKING COMPANY et al., Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD and ARMANDO VALENCIA, Respondents.	F044936 (WCAB No. FRE 021054) **OPINION**

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of review. Joy L. Krikorian, Administrative Law Judge.

Stockwell, Harris, Widom & Woolverton and Renee D. Logoluso, for Petitioners.

No appearance by Respondent Workers' Compensation Appeals Board.

Lawrence T. Musso, for Respondent Armando Valencia.

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*Before Harris, Acting P.J., Cornell, J., and Dawson, J.

Wawona Packing Company (Wawona) and its insurer California Indemnity Insurance Company (California Indemnity) petition for a writ of review to determine the lawfulness of a decision of the Workers' Compensation Appeals Board (WCAB). (Lab. Code,[1] § 5950; Cal. Rules of Court, rule 57.) Petitioners dispute the WCAB's finding that Wawana did not properly enroll its employee Armondo Valencia in its health care organization (HCO) and was therefore not required to follow the restrictive change of treating physician procedures of section 4600.3. We will deny the petition.

BACKGROUND

Born in March 1973, Valencia is a native Spanish speaker and cannot speak or read English. He has worked as a laborer for Wawona in Caruthers since early 2001.

In March 2002, Valencia attended a workplace safety meeting where he received two pamphlets written in Spanish. According to petitioners, the pamphlets described Wawona's HCO program administered through California Indemnity. Valencia did not know what the pamphlets addressed because he "hardly knows how to read Spanish" and no one read, discussed, or explained their content to him. Complying with Wawona's instruction, Valencia signed his name to a document acknowledging in English: "Employee Receipt of HCO Enrollment Form and Information." No one from Wawona asked Valencia if he read the pamphlets or advised him he could designate his own physician to treat any work-related injuries.

On August 7, 2002, Valencia sustained an admitted industrial injury to his head when he fell off a ladder struck by a tractor. A Wawona employee drove Valencia to its HCO program provider, Sierra-Kings Industrial Health Care (Sierra). Although Valencia went back to Sierra the next day for care, he never returned. Without notifying Wawona, California Indemnity, or Sierra, Valencia began treatment on August 14, 2002, with Accident Helpline Medical Group (Accident Helpline) outside Wawona's HCO program.

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[1] Further statutory references are to the Labor Code unless otherwise indicated.

Valencia received letters from California Indemnity advising him to attend medical appointments with Sierra; he did not attend the scheduled appointments because "every time he went to an insurance company doctor's appointment he was told that he had to go back to work even though they saw how he looked."

After an expedited workers' compensation hearing in February 2003, a workers' compensation administrative law judge (WCJ) ruled "the employer did not take sufficient steps to properly enroll the applicant in its HCO Group." The WCJ ordered California Indemnity to provide temporary total disability benefits in accordance with the opinions of his current primary treating chiropractor at Accident Helpline. As Valencia was not yet permanent and stationary,[2] the WCJ deferred awarding Valencia permanent disability.

After Wawona and California Indemnity petitioned the WCAB for reconsideration, the WCJ issued a report and recommendation explaining that despite Valencia's signature acknowledging receipt of the HCO enrollment form, he "testified, very convincingly, that he was told to sign the form and that he had no idea what he was signing." Moreover, the WCJ found Wawona failed to provide Valencia "an actual enrollment form wherein he was provided with a minimum of two HCO programs or to designate his own treating physician." The WCAB granted the petition for reconsideration and affirmed the WCJ's decision by written opinion.

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[2] The right to permanent disability compensation does not arise until the injured worker's condition becomes "permanent and stationary." (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1292.) "A disability is considered permanent after the employee has reached maximum improvement or his condition has been stationary for a reasonable period of time." (Cal. Code Regs., tit. 8, § 10152.)

DISCUSSION

Workers' compensation statutes must "be liberally construed by the courts with the purpose of extending benefits for the protection of persons injured in the course of their employment." (§ 3202.) The parties, however, "are considered equal before the law" in proving all issues by a preponderance of evidence. (§ 3202.5) In reviewing an order, decision, or award of the WCAB, we must determine whether, in view of the entire record, substantial evidence supports the WCAB's findings. (§ 5952; *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164.) Thus, if the WCAB's findings " ' "are supported by inferences which may fairly be drawn from evidence even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award." ' " (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d, 658, 664.)

A California employer has a statutory obligation to furnish medical treatment to an injured employee. (§ 4600.) The employer has the right to control the employee's medical treatment for 30 days after the injury is reported, unless the employee has notified the employer in writing before the injury that the employee has a personal physician, chiropractor, or acupuncturist. (*Ibid*.) Even within the first 30 days after injury, an employee may request a one-time change of physician. (§ 4601.) "This statutory right is intended to motivate the employer to arrange for treatment with a physician who will be acceptable to the employee and to motivate the physician to establish a good doctor-patient relationship with the employee so that the employee will not request a change of physicians at the end of the 30-day period." (2 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d. ed. 2003) § 22.01[2], p. 22-9.)

If an employer fails or refuses to provide medical treatment during its period of control, "then he loses the right to control the employee's medical care and becomes liable for the reasonable value of self-procured medical treatment." (*Braewood*

Convalescent Hospital v. Workers' Comp. Appeals Bd., supra, 34 Cal.3d at p. 165.) An employer's right to control medical care was significant because the primary treating physician was often entitled to the presumption of correctness under former section 4062.9. (See *Ordorica v. Workers' Comp. Appeals Bd.* (2001) 87 Cal.App.4th 1037, 1044.) The presumption, however, was recently repealed effective April 19, 2004, and no longer applies, even to injuries occurring before the presumption was abolished. (Sections 22 and 46 to 49 of Stats. 2004, ch. 34 (Sen. Bill. No. 899).)

An employer alternatively has the option of contracting with an HCO to treat its employees. (§ 4600.3, subd. (a)(1).) Such an employer retains medical control over the treatment of HCO covered employees for 90 days from the date the injury is reported.[3] (§ 4600.3, subd. (c)(1).) Employees may, however, designate a personal physician, chiropractor, or acupuncturist before the date of injury, effectively overriding the HCO contract. (§ 4600.3, subd. (a)(1).) The employer must give every employee an affirmative choice at the time of employment and at least annually thereafter to designate or change the designation of an HCO or personal physician; any employee who fails to select a personal physician, chiropractor, or acupuncturist must be treated by the HCO. (*Ibid*.)

In its opinion and decision after reconsideration, the WCAB agreed with the WCJ "that applicant's credible testimony that he did not comprehend the impact of the employer-provided HCO election form justifies the WCJ's finding that the defendant failed to comply with the requirements of Labor Code section 4600.2." The WCAB further noted there was no evidence that Wawona complied with the requirements of the

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[3] An employer additionally retains control over HCO covered employees for 180 days from the date the injury is reported if the employer pays for more than one-half the cost of health care coverage for nonoccupational injuries or illnesses or such coverage is established under a collective bargaining agreement. (§ 4600.3, subds. (c)(2) & (c)(3).)

Administrative Director's Rules contained in California Code of Regulations, title 8, sections 9779.3 and 9779.4 (regulations 9779.3 and 9779.4).

Addressing the requirement under section 4600.3, subdivision (a)(1) that every employer contracting with an HCO must give its employees an affirmative choice to designate either an HCO or personal physician, regulation 9779.3, subdivision (b) provides in relevant part:

> "Employees shall designate their enrollment option on form DWC 1194. This form must be maintained in the employee's personnel file for a minimum of three (3) years, and be made available to the employee or employee's representative upon request."

Information concerning the HCO program "shall be provided in written form, in no less than twelve (12) point typeface, and in a language understandable to employees." (Regulation 9779.3, subd. (a)(3).) Regulation 9779.4 sets forth the contents of form DWC 1194 and provides checkboxes for employees to indicate whether they want to enroll in an HCO, do not want to enroll in an HCO and select a personal physician, or do neither and allow the employer to enroll the employee in an HCO. The form requires the employees to sign and date their designation.

Here, Valencia testified that while he may have signed a document stating he received the HCO enrollment form, he had no idea what he was signing because he did not understand or read English. Wawona did not produce a form DWC 1194, or any other document demonstrating Valencia's choice to enroll in the HCO. The present case is unlike *Chen v. Workers' Comp. Appeals Bd*. (2003) 68 Cal.Comp.Cases 935, where the WCAB found an employee bound by her signed HCO enrollment form in light of her incredible testimony that she did not adequately understand English.

Under regulation 9779.3, Wawona was legally required to maintain Valencia's HCO enrollment form for a minimum of three years and produce it upon request. Lacking any evidence of Valencia's intent -- coupled with his credible testimony that he was never advised to select either the HCO or personal physician -- the WCAB

reasonably concluded Wawona did not properly enroll Valencia in the HCO program and Valencia was therefore not bound by the change of physician procedures of section 4600.3.[4]

DISPOSITION

The petition for writ of review and respondent's request for attorney fees are both denied. This opinion is final forthwith as to this court.

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[4] As the issue is not properly before us, we leave the WCAB to determine whether the treatment Valencia received from Accident Helpline without Wawona's approval within the first 30 days following notice of injury is compensable. (§ 4600.) Absent Valencia's enrollment in the HCO, Wawona maintained control over Valencia's medical treatment for 30 days. (*Ordorica v. Workers' Comp. Appeals Bd., supra,* 87 Cal.App.4th at p. 1044.)